

MEMORANDUM OF LAW

DATE: May 17, 1990

TO: Rod Rippel, Industrial Waste Program Director

FROM: City Attorney

SUBJECT: Consent Decree Applicability to Military Bases

You recently inquired whether a waste disposal permit required under section 64.0701 et seq. of the San Diego Municipal Code and section VII, paragraph 5 of the pending Consent Decree would be required of military installations. We hold that military installations are bound by the waste disposal restriction. Our reasoning follows.

We are mindful that both the Supremacy Clause and the Plenary Powers Clause of the United States Constitution (article VI, clause 2; article I, section 8, clause 17, respectively) give Congress exclusive legislative authority of all federal enclaves. As such, states and municipalities as subordinate governments may not regulate such enclaves "without a clear expression or implication to that effect." *United States v. Witteck*, 337 U.S. 346, 359 (1949).

Such a clear expression is manifest from section 313 of the Clean Water Act (33 U.S.C. section 1323).

Federal Facilities Pollution Control

Sec. 313.(a) Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants, and each officer, agent, or employee thereof in the performance of his official duties, shall be subject to and comply with all Federal, State, interstate, and local requirements, administrative authority and process and sanctions respecting the control and abatement of water pollution in the same manner and to the same extent as any nongovernmental entity including the payment of reasonable service charges ~~emphasis added~~. The preceding sentence

shall apply (A) to any requirement whether substantive or procedural (including any recordkeeping or reporting requirement, any requirement respecting permits and any other requirement, whatsoever), (B) to the exercise of any Federal, State, or local administrative authority, and (C) to any process and sanction, whether enforced in Federal, State, or

local courts or in any other manner. This subsection shall apply notwithstanding any immunity of such agencies, officers, agents, or employees under any law or rule of law

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33 U.S.C. section 1323

We are not unmindful of EPA v. State Water Resources Control Board, 426 U.S. 200 (1976), which construed Section 313 to obligate federal enclaves to state standards but not to the state NPDES permit process. We need not participate in the gossamer distinction between standards compliance and administrative compliance to require federal participation.

The Consent Decree, when signed, is a federal judicial order applicable to "all restaurants and commercial food preparation establishments . . . ." No distinction is made and none is intended in source of enforcement as in the NPDES permit system which is split between federal and state agencies. The federal order is plain. All restaurants and commercial establishments are required to install grease traps. While the administrative means are unspecified, the requirement is specified. Hence we find Section 313 through the court order to be "clear and unambiguous authority" to bind federal enclaves to the extent that such enclaves have "restaurants and commercial food preparation establishments." Any other construction of Section 313 would leave a federal enclave free to pollute and cause overflows in a system federally mandated by both the Clean Water Act and the federal court to be free from same. Such an inconsistency would make a mockery of the principle of federalism that the Supremacy Clause was fashioned to foster.

JOHN W. WITT, City Attorney

By

Ted Bromfield

Deputy City Attorney

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